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Nos. 1116 and 1117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants (No. 1116),

AND

F. V. HEINKEL, R. J. ROSIER, et al.,
Appellants (No. 1117),

VS.

PAUL W. PREISLER, LOUISE ERBE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

BRIEF OF APPELLANTS F. V. HEINKEL, ET AL.

PREAMBLE

This is an appeal from the judgment of the United States District Court for the Western District of Missouri, Central Division, entered on December 20, 1967, finding

that the 1967 Missouri Congressional Redistricting Act is unconstitutional and void. Probable jurisdiction was noted on March 4, 1968.

OPINION BELOW

The opinion delivered by the lower court has not been reported either officially or unofficially. It has been printed and filed herein as Appendices to the Jurisdictional Statement of Appellants James C. Kirkpatrick, Secretary of State of Missouri, and Norman H. Anderson, Attorney General of Missouri. The opinion, judgment and decree of the lower court appears at pages 1 to 22 inclusive; the findings of fact of lower court appear at pages 23 to 82 inclusive; the dissenting opinion of Judge M. C. Matthes appears at pages 82 to 95 inclusive; and comments of Honorable William R. Collinson in clarification of his concurrence appear at pages 97 and 98 of that Appendices to Jurisdictional Statement.

Prior opinions in this same litigation were referred to by the lower court as, and may be found at, *Preisler I*, 238 Federal Supplement 187 (W.D. Mo., 1965) and *Preisler II*, 257 Federal Supplement 953 (W.D. Mo., 1966).

GROUNDS FOR JURISDICTION OF THIS COURT

This is a congressional redistricting case involving the constitutionality of Missouri's 1967 Congressional Redistricting Act, Sections 128.202 to 128.303, V.A.M.S., 1967. The proceeding was brought pursuant to 28 U.S.C., Section 1343(3); Article III, Section 2, of the Constitution of the United States; and 42 U.S.C., Sections 1983, 1988 and 2201. The three-judge court was convened under 28 U.S.C., Sections 2281 and 2284.

The date of the judgment sought to be reviewed and the date of its entry is December 20, 1967. There was no motion or order with respect to rehearing. The notice of appeal filed by these appellants was filed on January 22, 1968. The notice of appeal filed by appellants Secretary of State and Attorney General was filed on January 12, 1968. Both notices of appeal were filed in the Central Division of the United States District Court for the Western Division of Missouri.

This Court noted probable jurisdiction on March 4, 1968. Designation of portions of the record to be included in the Appendix were made on March 14, 1968. A cross-designation was made by appellees on March 23, 1968.

The statutory provision conferring jurisdiction of this appeal on this Court is 28 U.S.C., Section 1253. The case sustaining the jurisdiction is *Wesbery* v. *Sanders*, 374 U.S. 802.

STATUTES INVOLVED

This case involves the constitutionality of the 1967 Missouri Congressional Redistricting Act. It may be found in the official publication, Missouri Revised Statutes—Cumulative Supplement, 1967, at pages 374 and 375 (Chapter 128). It may also be found in the pocket part of 8A Vernon's Annotated Missouri Statutes, page 18, as Sections 128.202 to 128.303. That Act is set out below verbatim:

(Chap. 128, Mo. Rev. Stats., Cum. Supp. 1967, pp. 374-375)

[TRULY AGREED TO AND FINALLY PASSED]
HOUSE SUBSTITUTE FOR
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL No. 182
74th GENERAL ASSEMBLY
AN ACT

To repeal sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo, 1965 Supp., relating to congressional districts and to enact in lieu thereof eleven new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292 and 128.302, RSMo, Supp. 1965, are repealed and eleven new sections enacted in lieu thereof, to be known as sections 128.203, 128.213, 128.223, 128.233, 128.243, 128.253, 128.263, 128.273, 128.283, 128.293 and 128.303, to read as follows:

128.203. The state of Missouri is hereby divided into ten congressional districts, the legal voters of each district to elect one member of Congress of the United States.

128.213. The first district shall be composed of the following wards in the city of St. Louis: 1, 2, 3, 4, 18, 19, 20, 21, 22, 25, 26 and 27, of precincts 3 through 18 of ward 5; and of Washington township and St. Ferdinand township in St. Louis county.

128.223. The second district shall be composed of the following townships in St. Louis County: Airport, Clayton, Creve Coeur, Ferguson, Gravois, Hadley, Jefferson, Lin-

coln, Midland, and Normandy, and the following precincts of Bonhomme Townships 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91, 93.

128.233. The third district shall be composed of the following wards in the city of St. Louis: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, 24 and 28, of precincts 1, 2, 19 and 20 of ward 5; and of Lemay township in St. Louis County.

128.243. The fourth district shall be composed of the following wards in the city of Kansas City: Wards 15 and 24; and the following townships in Jackson County, to wit: Washington, Blue, Brooking, Fort Osage, Van Buren, Prairie and Sni-A-Bar; and the following counties: Cass, Bates, Vernon, St. Clair, Henry, Johnson, Lafayette, Saline, Barton, Benton and Pettis.

128.253. The fifth district shall be composed of the following wards in the city of Kansas City: Wards 1 through 14, inclusive; 16 through 20, inclusive; and Wards 22, 23 and 25.

128.263. The sixth district shall be composed of the following counties: Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, DeKalb, Clinton, Clay, Harrison, Daviess, Caldwell, Mercer, Grundy, Livingston, Linn, Ray, Putnam, Sullivan, Chariton and Carroll.

128.273. The seventh district shall be composed of the following counties: Laclede, Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, Camden, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Wright, Douglas and Ozark.

128.283. The eighth district shall be composed of the following counties: Cooper, Morgan, Moniteau, Miller, Cole, Maries, Pulaski, Phelps, Texas, Dent, Crawford,

Washington, Boone, Howard and Jefferson; and the following townships in St. Louis County: Concord and Meramec, and all of Bonhomme except precincts 1, 2, 3, 6, 7, 8, 19, 41, 48, 59, 77, 89, 90, 91 and 93.

128.293. The ninth district shall be composed of the following counties: Macon, Adair, Schuyler, Scotland, Clark, Knox, Lewis, Shelby, Marion, Randolph, Monroe, Ralls, Audrain, Pike, Callaway, Osage, Montgomery, Lincoln, Warren, Gasconade, Franklin and St. Charles; and the following townships in St. Louis County: Spanish Lake and Florissant.

128.303. The tenth district shall be composed of the following counties: Howell, Shannon, Reynolds, Iron, St. Francois, Ste. Genevieve, Perry, Cape Girardeau, Madison, Wayne, Carter, Oregon, Ripley, Butler, Bollinger, Stoddard, Scott, Mississippi, New Madrid, Pemiscot and Dunklin.

QUESTIONS PRESENTED FOR REVIEW

1.

Does the Missouri 1967 Congressional Redistricting Act (Sections 128.202 to 128.303, V.A.M.S., 1967) under which the average variation from ideal is 1.6%, the ratio of the largest to the smallest district is 1.06% to 1, 59% of the total population of the State is required to elect a majority (6 out of 10) of the congressional delegation, the largest variation from ideal was 3.13% above (the district which contains approximately 40,000 soldiers at Fort Leonard Wood, the State Capitol at Jefferson City and approximately 17,000 students at the University of Missouri at Columbia) and the lowest was 2.84% below, one-half of the districts are above ideal and one-half of the districts are below ideal, and 7 of the 10 districts are within 1.88%

of ideal, violate Article I, § 2 of the United States Constitution as construed in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)?

2.

In *Connor* v. *Johnson*, No. 3830 decided by a three-judge court in the Southern District of Mississippi on September 28, 1966, and affirmed by the Supreme Court at 386 U.S. 483 (1967), the average variation from the ideal population per district, the disparity ratio and the maximum and minimum variations were greater than those which result from Missouri's 1967 Act. That being true, does the judgment appealed from herein result in the application of a double standard by the Federal Judiciary? That is, that which is permissible in Mississippi is not permissible in Missouri?

3.

Does the doctrine of de minimis apply to congressional reapportionment, as suggested by the lower court herein in *Preisler II*, 257 F. Supp. 953 (1966) and, if so, do the population variations resulting from the Missouri 1967 Act violate that doctrine?

4.

Is there a presumption that the Missouri 1967 Act is constitutional and do those asserting unconstitutionality have the burden of demonstrating it?

5.

The undisputed testimony of the officers of the legislature was that the Act, as passed, apportioned the population as nearly equal as is "practicable" from the stand-

point of getting an Act passed. There was no evidence to the contrary, although plaintiff-appellees served notice that they would introduce evidence at the hearing they elected not to do so. This being true and the average variation from ideal being only 1.6%, the disparity ratio being only 1.06% to 1, 7 of the 10 districts being within 1.88% of ideal and the maximum variations being 3.13% above and 2.84% below, was it proper for the lower court to declare the Act unconstitutional?

STATEMENT OF THE CASE

Missouri has 10 congressional districts. The population of the State is 4,319,813. Accordingly, an Ideal district would contain 431,981 people (Ex. 13, A. 51).

When the current chapter of this litigation was commenced there was an error in the population of some of the districts. This was discovered at the pre-trial stage. It was stipulated by all parties that in order to correct this error and to be certain of the number of people actually living in each district under the 1967 Act the Bureau of the Census would be requested to certify as to the number of people living in each of the districts, according to the 1960 census. This was done and that Bureau so certified.

The population figures submitted by the Bureau of the Census under date of October 6, 1967, are as follows (Ex. 13, A. 51):

District No.	Population	Per Centage of Variation from Ideal
One	439,746	+ 1.8
Two	436,448	+ 1.03
Three	436,099	+ .95
Four	419,721	- 2.84
Five	431,178	- .19
Six	422,238	- 2.26
Seven	436,769	+ 1.11
Eight	445,523	+ 3.13
Nine	428,223	- .87
Ten	423,868	- 1.88
Total:	4,319,813	

Ideal population per district:	431,981
Average variation from Ideal:	1.6%
Ratio of largest to smallest district:	1.06 to 1
Per centage of total population required to elect majority of congressional delegation:	59%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 1.88% of Ideal:	7
Population difference between largest and smallest districts:	25,802

The Opinion in this case handed down August 5, 1966, *Preisler II*, and reported at 257 F. Supp. 953, l. c. 957, involving the 1965 Act was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	474,895	+ 9.94
Two	460,501	+ 6.61
Three	469,886	+ 8.78
Four	402,813	- 6.74
Five	405,780	- 6.06
Six	394,236	- 8.73
Seven	425,820	- 1.42
Eight	443,747	+ 2.73
Nine	451,893	+ 4.62
Ten	389,880	- 9.74
Total:	4,319,451	

Ideal Population per district:	431,945
Average variation from Ideal:	6.54%
Ratio of largest to smallest district:	1.218 to 1
Per centage of total population required to elect majority of congressional delegation:	57%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 6.74% of Ideal:	6
Population difference between largest and smallest districts:	85,015

The 1961 Redistricting Act declared invalid on January 4, 1965, *Preisler I*, and reported at 238 F. Supp. 187, l.c. 188, was determined upon the following figures and statistics:

District No.	Population	Per Centage of Variation from Ideal
One	466,482	+ 7.99
Two	506,854	+17.33
Three	480,222	+11.17
Four	418,981	- 3.01
Five	378,499	-12.38
Six	388,486	-10.07
Seven	436,933	+ 1.15
Eight	452,285	+ 4.7
Nine	409,365	- 5.24
Ten	381,602	-11.66
Total:	4,319,709	

Ideal population per district:	431,981
Average variation from Ideal:	8.47%
Ratio of largest to smallest district:	1.339 to 1
Per centage of total population required to elect majority of congressional delegation:	56%
Number of districts above Ideal:	5
Number of districts below Ideal:	5
Mean between the average per centage above Ideal and average per centage below Ideal:	0
Number of districts within 10.07% of Ideal:	6
Population difference between largest and smallest districts:	128,355

Obviously, the Missouri legislature has accomplished a great deal since January 4, 1965. Since that date the difference in population between the largest and smallest districts has decreased from 128,355 to 85,015 to 25,802; the number of districts within a certain percentage of an ideal district has gone from 6 within 10.07% to 6 within

6.74% to 7 within 1.88%. The disparity ratio between the largest and smallest districts has gone from 1.339 over 1 to 1.218 over 1 to 1.06 over 1 and the average variation from the ideal district has decreased from 8.47% to 6.54% to 1.06%.

Fort Leonard Wood is located within the eighth district. It has approximately 40,000 soldiers, many of whom are non-residents of the state of Missouri and are ineligible to vote upon congressmen in Missouri (A. 74, 75). Also included in the population figures for the eighth district are many state employees who maintain their voting residences in their home counties outside of that district as well as the University of Missouri with its principal campus at Columbia, its campus at Rolla and also Lincoln University in Jefferson City (A. 82, 83, 98). A high per centage of these students are not old enough to vote, and most of those who do vote do so in the counties of their home residence.

The undisputed evidence was that in considering and adopting the 1967 Act the legislature gave primary consideration to equality of population (A. 72, 81, 82); and that it gave subordinate consideration to the maintenance of compactness and contiguity (A. 72, 83) and natural and historic boundary lines (A. 72, 83, 84).

ARGUMENT

Prior to the judgment and opinion appealed from herein no court, federal or state, had declared unconstitutional a congressional redistricting act which produced the minimal deviations from Ideal which result from the 1967 Missouri Act. In each of the cases cited in the majority opinion of the lower court the Act declared unconstitutional resulted in deviations from Ideal much, much greater than those produced by the 1967 Missouri Act. The major-

ity opinion cited no case in which the factual situation resulting from the Act was even close to the situation at Bar. Very conspicuously the majority opinion did not cite nor discuss *Connor* v. *Johnson*, 386 U.S. 483, 18 L. ed. 2d 224 (1967). It was buried in Appendix C where it was said to be inapplicable because of the majority's view of the technical nature of the rules of appellate practice. The dissenting opinion referred to that omission as "the herculean efforts of my brothers to sweep *Connor* v. *Johnson*, 386 U.S. 483 (1967), under the rug."

In that case the 1966 Mississippi Congressional Redistricting Act was attacked. According to the opinion of the lower court (in that case) the Complaint charged that "Each of the Congressional Districts should contain 435,628 persons, to be apportioned on a strict population basis." In footnote No. 1 the court said:

> "While the sole question before the Court was whether House Bill 911 of the Laws of Mississippi of 1966, as far as practicable, apportioned the State into Congressional Districts of equal population in compliance with *Wesberry* v. *Sanders*, there were numerous objections raised by both sides as to the admission of certain items of evidence."

The Court went on to say that:

> "We are of the view that the adjudication of this controversy is controlled by Wesberry v. Sanders, * * *."

It then cited other congressional reapportionment cases, all of which were based upon *Wesberry* v. *Sanders* and Article I, Section 2 of the Constitution of the United States.

On appeal to this court Appellant's Jurisdictional Statement said:

> "Nor does the legislature's adopted plan conform to standards of population equality when compared to the available alternatives. The difference between the

largest and the smallest district under the plan adopted is 28,061; the same figure for the Revised Delta Plan is 13,672, less than half. The greatest deviation from the norm in the adopted plan is 15,332; in the Revised Delta Plan, it is 7,572. The average deviation of all five districts in the adopted plan is 11,547; in the Revised Delta Plan, it is 3,767. Clearly, the desire to achieve mathematical population equality was not decisive for the Mississippi legislature in its choice of plans." P. 8, appellant's jurisdictional statement filed in the Supreme Court.

This court affirmed that judgment, *Connor* v. *Johnson*, 386 U.S. 483, 18 L. ed. 2d 224 (1967).

Under the Mississippi Act the population figures and statistics are as follows:

District No.	Population	Per Centage of Variation from Ideal
First	449,361	+ 3.15
Second	427,468	- 1.87
Third	428,447	- 1.65
Fourth	423,300	- 2.82
Fifth	449,565	+ 3.19
Total:	2,178,141	

Ideal population per district:	435,628
Average variation from Ideal:	2.53
Ratio of largest to smallest district:	1.06 to 1
Percentage of total population required to elect majority of congressional delegation:	58%
Number of districts above Ideal:	2
Number of districts below Ideal:	3
Mean between the average percentage above Ideal and average percentage below Ideal:	+1.06
Number of districts within 2.82% of Ideal:	3
Population difference between largest and smallest districts:	26,265

It has been stated in *Swann* v. *Adams*, 385 U.S. 440, l.c. 445, 17 L. ed. 2d 501, 87 S. Ct. 569 (1967), and *Reynolds* v. *Sims*, 337 U.S. 533, l.c. 578, 12 L. ed. 2d 506, 84 S. Ct. 1362, that the approval in one state of a particular percentage of variation from the norm has little bearing on the validity of a similar variation in another state. The reason for this is that the two states involved might have totally different subordinate considerations. That is, one state may have done a good job on compactness and contiguity whereas the other state didn't; one state may have given some recognition to natural or historical boundary lines whereas the other state didn't; one state may have preserved the integrity of political subdivisions whereas the other state didn't. Obviously if there is a difference in these subordinate considerations then the similarity of population statistics would not be near so significant, and certainly not controlling.

On the other hand, if State A did not consider compactness and contiguity, natural or historical boundary lines, or the integrity of political subdivisions, but, nevertheless, received the approval of this court of a population variation of X%, then State B should also receive approval of this court of a population variation of X minus 1 if it has also given consideration to these subordinate factors. In other words, the subordinate factors, which must be free from any taint of arbitrariness or discrimination, might justify a larger percentage of deviation, however, they would not render invalid a smaller percentage of deviation. To hold otherwise would penalize state B for having considered these legitimate factors—even though they were free from any taint of arbitrariness or discrimination.

The opinion of the lower court in the Mississippi case does not indicate that there was any evidence or consideration of compactness and contiguity, natural or histor-

ical boundary lines or the integrity of political subdivisions. A Fortiori that opinion does not indicate that the approval of the Mississippi Act resulted from a consideration of those subordinate factors. It follows that the Missouri Act, which results in smaller variations from Ideal and in the discussion and passage of which subordinate consideration was given to compactness and contiguity, natural and historical boundary lines and the integrity of political subdivisions, should also receive the approval of this court.

It is apparent that the congressmen in Mississippi will be elected in 1968 and 1970 under a redistricting act which produces greater variations from Ideal than does the 1967 Missouri Act. This will be done with the approval of both the three-judge district court *and also this court.* It is respectfully and urgently submitted that if the judgment of the lower court herein is not reversed the federal judiciary will have imposed a double standard of constitutionality. That which is permissible in Mississippi will not be permissible in Missouri. To avoid this the judgment of the lower court should be reversed.

Toombs v. *Fortson,* 241 F. Supp. 65 (N.D. Ga. 1965), was affirmed by this court at 384 U.S. 210, 16 L. ed. 2d 482 (1966). That case is authority for the proposition that a deviation from Ideal of 15% is permissible in a state legislative case. A Fortiori a maximum deviation of 3.13% with an average deviation of 1.6% is permissible in a congressional redistricting case.

In *Drum* v. *Seawell,* 271 F. Supp. 193 (M.D. N. Car., 1967) the 1967 North Carolina Congressional Redistricting Act was held to be valid. The deviations from ideal resulting from that Act are very close to those resulting from the 1967 Missouri Act. In North Carolina the ratio of

the largest to the smallest district is 1.04 to 1, the average variation from ideal is 1.06%, and the greatest variations are from a –1.86% to a +2.31%. The population difference between the largest and the smallest district is 17,276. Although the statistics in North Carolina are a shade better than those in Missouri surely it cannot be said that the difference between constitutionality and unconstitutionality can be sliced so thinly.

The Massachusetts case of *Dinis* v. *Volpe*, Civil Action No. 66-767-G was decided by the Federal District Court on October 3, 1967. It is not yet reported. In it the Massachusetts Congressional Redistricting Act was held valid. This holding was in spite of the fact that another plan had been presented to the Massachusetts legislature, which plan would have reduced by almost one-half the population variations in the district. This court affirmed that judgment on January 15, 1968, *Dinis* v. *Volpe*, ____ U.S. ....., 19 L. ed. 2d 785, 88 S. Ct. ..... This court's docket No. was 882.

In the Florida case, after holding the Act invalid the court decreed a Congressional Apportionment. Under the court decree it was thought that the variation between the largest and smallest districts would be 1.49%. After the decree was entered it was discovered that the population figures which the Court had used were substantially erroneous. Accurate population figures were obtained from the Bureau of the Census. When these accurate figure were applied to the plan decreed by the Court the variance between the smallest and largest district was revealed to be 11.83%. In the light of this information a motion to reconsider was filed. The lower court overruled that motion and an appeal was taken to this court. This court affirmed the lower court's judgment on January 15, 1968. In the lower court this case was *Gong* v. *Kirk*, Civil No.

64-143-CIV-EC. In this court it was *Kirk* v. *Gong*, docket No. 872, ... U.S. ....., 19 L. ed. 2d 784, 88 S. Ct. .....

In the case at bar the dissenting opinion of Circuit Judge M. C. Matthes is a scholarly and deadly-accurate statement of the applicable law. It recognizes that redistricting is a *legislative* function. Also, Judge Matthes' excellent opinion correctly analyzes the majority opinion as holding, in effect, and as a reality, that every apportionment act must be cast aside if the reviewing court can devise a scheme for more equal representation. That is precisely the result of the majority opinion.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed, the Motion for Approval of Congressional Apportionment and for Termination of Proceedings (Ex. 5, A. 7) should be sustained and the 1967 Missouri Congressional Redistricting Act should be declared valid and constitutional.

Respectfully submitted,

DAVID COLLINS
107 1/2 North Rollins Street
Macon, Missouri 63552
Telephone: 351-2123
Area Code 816
Attorney for Appellants F. V. Heinkel, R. J. Rosier, W. W. Beckett, A. D. Sappington, L. O. Wallis, Miller Hern, Herman Hetlage, Herman Kertz, Turpin Youtsey and Glen Myers